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No. 85-929

UNITED STATES SUPREME COURT

October Term 1985

BILL N. SLACK, et al.,

Petitioners,

and

JOHN C. BROOKS, Commissioner of Labor of the State of North Carolina,

Appellant,

v.

BURLINGTON INDUSTRIES, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Did the Court of Appeals Err in Applying the Arbitrary and Capricious Standard of Review For Burlington Industries, Inc.'s Decision Not to Pay Severance Pay to the Plaintiffs?

II. Did the Court of Appeals Err in Holding, Contrary to the Rulings of the Ninth and Second Circuits, that Procedural Violations of an Employer of ERISA Should Not be Considered in Deciding whether the Failure to Pay Severance Pay was Arbitrary and Capricious?

III. Did the Court of Appeals Err When It Held that the Agreement of the Defendant Burlington Industries was a Welfare Benefit Plan Under ERISA and that ERISA preempted State Wage Collection Laws and State Common Law?

PARTIES

The parties to this proceeding are Bill N. Slack; Jimmy W. Aheron; Carol Aldridge; Pamela B. Apple; Carole Gaggett; Thomas F. Bowden; Walter Brom; Nellie B. Burwell; Elizabeth S. Canada; Gary L. Carter; Irene Chandler; James J. Clifford; Linda S. Coble; James A. Crawford; Ruth Dixon; Octavia M. Driver; Edmund Foster; Richard C. Foy; Peggy A. Gerringer; Deville Goodman; Ada R. Griffin; Delanor M. Hamby; Mildred R. Hester; Evelyn H. Hilton; Peggy W. Hodge; Rose M. Holland; Mary E. Hope; Joseph J. Houston; Don Huffman; Jeff Hughes; Yvonne B. James; Melvin E. King; Norma M. Loy; Sara Copeland Maness; Linda Monneyham; Cora N. Moore; Virginia M. Moore; Robert C. Moricle; Edna M. Murray; Faye F. Neese; Gladys J. Oakley; Patricia G. Page; Daniel E. Perry; Barbara E. Petty; P. Douglas Pierce; Betty Hornady Ray; Ruth S. Rich;

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Brenda B. Herndon; Russell W. Herndon; Virginia H. Schulte; Sandra G. Walker; Sharon G. Warren; Shirley W. Welch; Roger Downs, Plaintiffs. John C. Brooks, Commissioner of Labor of the State of North Carolina, Intervenor Plaintiff. Burlington Industries, Inc.; Calvin A. Michaels; Charles A. McLendon; Huberto L. Quintana, Defendants.

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*Rose M. Holland, Jean H. Stallings, and Walter Burlington, Jr. were parties to the proceedings in the U. S. District Court but did not appeal to the U. S. Court of Appeals for the Fourth Circuit, but were listed in the caption of that case.

John C. Brooks, Commissioner of Labor of the State of North Carolina, has filed an appeal in this action to this Court.

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OPINIONS BELOW

The decision of the Court of Appeals is reported (772 F.2d 1140) and appears in Appendix A-1-A-43. The decision of the District Court is not reported and appears in Appendix A-44-A-65.

JURISDICTION

The opinion of the Court of Appeals for the Fourth Circuit was filed and entered on September 3, 1985 (Appendix A-1-A-43.) The Court has jurisdiction pursuant to Section 1254(1) of Title 29 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et seq. Pertinent portions of these (29 U.S.C. §§1001(b), 1002(1), 1002(21)(A), 1021(a) and (b), 1022, 1023(a)(1)(A), 1024(a)(1), 1104(a)(1), 1132(a) and (e), 1133, and 1140 are set forth in the Appendix (A-66-A-76).

STATEMENT OF THE CASE

A. Statement of the Facts.

This is a suit by 200 former employees of the defendant Burlington Industries, Inc. (Burlington) for severance pay. Plaintiffs were employed by Burlington as salaried employees in its Hosiery and Socks Divisions prior to January 3, 1982. Effective that date, Burlington sold its Hosiery and Socks Divisions to Kayser-Roth as going operations. On that day, or shortly thereafter, all of the plaintiffs were involuntarily terminated by Burlington and re-employed by Kayser-Roth, but did not receive severance pay from Burlington.

Burlington's severance pay plan was set forth in a Company Policy Manual and the Salaried Employees' Handbook. The Salaried Employees' Handbook which was distributed to all salaried employees of Burlington contained the following provisions

on severance pay:

> SEVERANCE PAY. The Company provides severance pay to full-time employees who involuntarily leave the Company. Pay ranges from two weeks to twelve months, based on the employee's age and length of continuous service with the Company. Fraud or other behavior deemed to be willful could disqualify an employee from receiving severance benefits.

Burlington's Company Policy Manual, a large document containing numerous policies of the company, contained a more detailed explanation of its severance pay policy. This manual served as a guide for managers of the company and was generally available for inspection by employees, but was not distributed to them. With respect to severance pay the Company Policy Manual provided, in part, as follows:

> ELIGIBILITY - Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the company. The eligibility requirements are:

> (a) Job elimination - This category consists of terminations due to circumstances such as elimination or modification of operations or other job eliminations due to bonafide organizational changes.
>
> (b) Other Involuntary Terminations - These are terminations due to unsatisfactory job performance which is not willful . . .

The Company Policy Manual set forth a payment schedule for severance pay based on age and length of service. At the bottom of the payment schedule was the following provision:

> No severance pay is paid beyond age 70, beyond the monthly pay period in which death occurs, and upon re-employment by the company.

Severance pay was paid to salaried employees in periodic installments by Burlington following the termination of their employment. An employee receiving

severance pay would continue to receive it even if he obtained employment with a company other than Burlington.

Prior to the filing of this action, Burlington failed to comply with the filing and disclosure requirements contained in certain sections of the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §1021(a) and (b). The severance pay plan did not contain the required claims procedure set forth in ERISA, 29 U.S.C. §1133. After the action was filed, Burlington adopted a policy of not considering any of the plaintiffs for re-employment and continued such policy until the plaintiffs filed a Motion for Preliminary Injunction to force Burlington to stop this discrimination in violation of ERISA. 29 U.S.C. §1140.

Severance payments are made from the general operating funds of Burlington.

Trustees were not named to administer the severance pay plan. The company itself made all of the decisions with respect to the plan and thus served as the ERISA fiduciary. 29 U.S.C. §1002(21)(A).

Following the announcement of the sale of the Socks and Hosiery Divisions to Kayser-Roth, meetings were held with large numbers of salaried employees at which it was announced by company executives that severance pay would not be paid to the employees. A small number of employees received severance pay even though they refused employment at Kayser-Roth as "hardship" cases. These persons received severance pay by ad hoc decisions made by executives of Burlington even though neither the Company Policy Manual nor the Salaried Employees Handbook contained any reference to "hardship" cases.

B. The Proceedings Below.

Plaintiffs filed this action in State Court in North Carolina in February, 1983. The complaint alleged claims for severance pay based on the common law of contracts, the North Carolina Wage and Hour Act, N.C. G.S. §95-25.1 et seq. and for damages for violation of the North Carolina Unfair or Deceptive Trade Practices Act, N.C.G.S. §75-1.1 et seq. In March, 1983, John C. Brooks, Commissioner of Labor of the State of North Carolina, (Commissioner), filed a motion to intervene which was granted. The case was removed (28 U.S.C. §1441) to federal court under ERISA (29 U.S.C. §1132(e)). The plaintiffs amended their complaint to allege in the alternative claims arising under ERISA, 29 U.S.C. §1132(a).

Following discovery, the parties made cross motions for summary judgment. In October, 1984, the District Court granted the defendant's motion for summary judgment, denied the plaintiffs' motion for partial summary judgment, denied the Commissioner's motion to remand the case to the State Court, and denied the motion of the plaintiffs for injunctive relief to halt the employment discrimination against them.

The Fourth Circuit affirmed the decision of the District Court, holding that ERISA governs the issues presented by the claims of the plaintiffs, that ERISA preempts North Carolina State law, that the decision of Burlington not to pay severance pay to the plaintiffs was not arbitrary and capricious, and that the plaintiffs were not entitled to injunctive relief against Burlington Industries for its discrimination against the plaintiffs.

Another group of former Burlington employees who were employed by the company in New York filed suit seeking severance pay from the company in New York. Their claims also arose from the sale of the Socks and Hosiery Divisions to Kayser-Roth and are similar in most respects to these of the plaintiffs. Gilbert v. Burlington Industries, Inc., 765 F.2d 320 (2nd Cir. 1985), Appeal Docketed in the U. S. Supreme Court Nos. 85-441 and 85-460 (1985).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT BECAUSE A SUBSTANTIAL QUESTION OF INTERPRETATION OF ERISA IS PRESENTED BY THE LOWER COURT'S ADOPTION OF AN ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW OF BENEFIT DECISIONS BY EMPLOYERS.

The Fourth Circuit has decided in this case to uniformly uphold an employer's denial of employee welfare benefits, such as severance pay, unless the beneficiary can prove that such denial by the employer was arbitrary and capricious. This standard represents a severe departure from Anglo-American jurisprudence where parties have been treated as equals before the court with the contentions of no party given the deference accorded the defendant's in this proceeding.

ERISA contains absolutely no authorization for the adoption of such a standard of review by the courts. This procedure apparently originated in a series of cases involving coal miner's claims for pension

benefits against the United Mine Workers of America Welfare and Retirement Fund. Danti v. Lewis, 312 F.2d 345 (D.C.Cir. 1962); Kennet v. United Mine Workers of America, 183 F.Supp. 315 (D.D.C. 1960); Ruth v. Lewis, 166 F.Supp. 346 (D.D.C. 1958); Hobbs v. Lewis, 159 F.Supp. 282 (D.D.C. 1958). The decisions are divded as to whether the mine workers had a contractual right to benefits, Kennet v. United Mine Workers of America, 153 F.Supp. at 318; Hobbs v. Lewis, 159 F.Supp. at 286, or were merely the beneficiaries of a non-charitable trust. Ruth v. Lewis, 166 F.Supp. at 349. The degree of review of the trustees' decisions on pension benefits varied with the contractual rights' decision opting for closer control and the non-charitable trust decision favoring little judicial control.

The above decisions involving coal miners' pension rights were decided ten to

fifteen years before Congress enacted ERISA. However, some courts with no objection from the parties and little or no discussion have adopted this standard of review when reviewing decisions by pension fund trustees. See Horne v. Mullins, 650 F.2d 35 (4th Cir. 1981); Miles v. New York State Teamsters Conference, Etc., 698 F.2d 593 (2nd Cir. 1983).

In this case there are no trustees to serve as impartial decision makers. The decision not to pay severance benefits was made by the employer, a party to this action. The defendant Burlington served as the ERISA fiduciary for the severance pay program since the company exercised "discretionary authority" in the administration of the plan. 29 U.S.C. §1002(21)(A).

In its role as payor of the benefits and ERISA fiduciary, Burlington obviously has a conflict of interest. The Court in McLaughlin v. Connecticut General Life

Insurance Company, 565 F.Supp. 434, 447 n. 9 (N.D.Cal. 1983) recognized this problem when it stated:

> . . . It strains credulity to suggest, as defendant does here, that when an insurance company is the fiduciary making claims decisions under its group policy, that it is due the same deference accorded to trustees who have no financial interest in their decisions. . . . Similarly in order to enforce ERISA's fiduciary standards for claim denials, it may be appropriate . . . to apply [strict rules of construction] when the ERISA fiduciary making the denial [has] a financial interest in the decision.

Despite the conflict of interest of the Burlington, the Fourth Circuit adopted the arbitrary and capricious standard of review for all claims arising under ERISA. This constitutes judicial legislation which will severely arode the interests of benefit plan participants Congress intended to protect in enacting ERISA.

Congress, in its findings and declarations of policy for ERISA stated, in part:

> (b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interest of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the courts.
>
> 29 U.S.C. §1001(b)

The Court in Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983), described ERISA as a comprehensive statute designed to protect the interest of employees and their beneficiaries in employee benefit plans.

One of the fundamental principles of ERISA is the existence of a full and fair review of the employee's claim by the plan trustees or administrators. ERISA has

mandated a claims procedure which must be utilized in all employee benefit plans. 29 U.S.C. §1133 requires that a participant whose claim has been denied be provided notice setting forth the specific reason for the denial. 29 U.S.C. §1133(1). In addition, 29 U.S.C. §1133(2) requires that every employee benefit plan

> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

In this case the plan has no named fiduciary, so that the fiduciary of the plan is the employer, Burlington Industries. There was no full and fair review of the claims of the plaintiffs. The employer simply denied the claims.

The total absence of full and fair review of the employees' claims by the

employer makes the utilization of the arbitrary and capricious standard inappropriate. In order for an employer to receive the benefit of such a deferential method of decision making, strict compliance with 29 U.S.C. §1133 of ERISA must be a prerequisite. The Fourth Circuit failed to recognize this distinction and justified its decision on the basis that it was better to leave the administration of welfare benefit plans to administrators who are more experienced in these matters than judges. In this case the plan administrator was the company. Burlington Industries may be more experienced than most judges in administering a severance pay plan, but this completely deprives an employee of a full and fair review of his or her claim as required by ERISA, 29 U.S.C. §1133(2).

ERISA provides standards for fiduciaries. The Act provides, in part, as follows:

§1104. Fiduciaries duties.

(a) Prudent man standard of care.

(1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and fiduciaries and -

(D) In accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

29 U.S.C. §1104(a)(1)(D).

The plaintiffs in this case urged the lower court to apply the fiduciary standards of ERISA to the defendant Burlington but the Court declined to do so stating that these standards were normally reserved for review of trustees' management of trust assets. Under ERISA fiduciary standards are

not reserved for the management of trust fund assets. The above quoted section of ERISA specifically applies fiduciary standards to the administration of the employee benefit plan by requiring that the fiduciary discharge his duties in accordance with the documents and instruments governing the plan. 29 U.S.C. §1104(a)(1)(D).

The Court in Struble v. New Jersey Brewery Employee Welfare Trust Fund, 732 F.2d 325 (3rd Cir. 1984), did not use the arbitrary and capricious standard of review. In that case the employer trustees elected to utilize a refund of surplus medical premiums to either reduce future employer constributions or as a direct refund to the employers. The Court rejected the arbitrary and capricious standard of review because the basis of the plaintiff's complaint in that case was not that the

"trustees have incorrectly balanced the valid interests, but rather that they have sacrificed valid interests to advance the interests of non-beneficiaries." 732 F.2d 333-334. In this case there are no trustees and no separate fund. The decision in this case was made by the company not to pay severance pay benefits thereby benefiting itself, a non-beneficiary of the severance pay plan. The reasons for not applying the arbitrary and capricious standard are stronger in this case than in Struble v. New Jersey Brewery Employee Welfare Trust Fund, supra.

The Court will look to ERISA in determining the appropriate standard of review for the denial of claims by beneficiaries of welfare benefit plans. The legislative history of ERISA indicates that Congress intended that the courts would develop a body of federal substantive law under ERISA.

120 Cong.Rec.S 15751 (daily ed. August 22, 1974)(remarks of Senator Javits). The House Conference Report on the legislation stated that all actions to enforce ERISA "are to be regarded as arising under the laws of the United States in similar fashion to those brought under §301 of the Labor-Management Relations Act of 1947." H.R. Conf.Rep. No. 93-1280, 93d Cong.2d Sess., reprinted in 1974 U.S. Code Cong. & Admn. News 4639, 5106-07. This Court in Textile Workers Union v. Lincoln Mills, 354 U.S. 448, 77 Sup.Ct. 912, 1 L.Ed.2d 972 (1957) stated that in fashioning federal common law the courts are to rely first on the policy of the Act and are to fashion a remedy which will effectuate that policy. In addition, the Courts are to look at state law if it is compatable with the purposes of the federal statute. State law, which the courts apply, will be absorbed as

federal law.

The policies and provisions of ERISA as set forth above plainly indicate that the adoption of an arbitrary and capricious standard of review is not appropriate in this case. It is more consistent with purposes of ERISA for the court to decide the case by interpreting the plan documents just as courts interpret contracts in cases arising under the common law. Under ERISA, a fiduciary is required to administer the plan in accordance with the plan documents insofar as they are consistent with the terms of ERISA. 29 U.S.C. §1104(a)(1)(D). In interpreting plan documents, fiduciaries and courts should apply principles of contract law insofar as they are consistent with ERISA.

Prior to ERISA becoming effective a body of common law had developed which provided that when part of a company is sold and the employees are told that they cannot remain

with their old employer, as in this case, their employment has been terminated and they are entitled to severance pay even though they immediately began to work for the new owner. Dahl v. Brunswick Corporation, 356 A.2d 221 (Md. 1976); Hinkeldy v. Cities Service Oil Company, 470 S.W.2d 494 (Mo.1971); Willets v. Emhart Mfg. Co., 208 A.2d 546 (Conn. 1965); Adams v. Jersey Central Power and Light Company, 114 A2d 776 (Super.Ct.N.J. 1955), aff'd. 120 A.2d 737 (N.J. 1956); Chapin v. Fairchild Camera & Instrument Corp., 107 Cal.Rptr. 111 (Ct.App.Cal. 1974); Gaydos v. White Motor Corporation, 220 N.W.2d 697 (Mich. App. 1974).

In these cases the State appellate courts interpreted severance pay plans for employers using common law contract principles. These principles are consistent with ERISA and there is no reason courts should

not consider these principles when seeking to develop a federal common law principle under ERISA. Application of the arbitrary and capricious standard of review by the lower court in this case results in the plaintiffs' and countless other employees being deprived of severance pay and other benefits which they otherwise would have received under the common law of contracts. Such a result is a perversion of the purposes of ERISA.

When the employer administers the plan itself and thereby has a conflict of interest, the arbitrary and capricious is not appropriate. ERISA requires a full and fair review of benefit claims. 29 U.S.C. §1133 (2). If the plan does not so provide, then courts must do so to carry out the intentions of Congress in enacting ERISA.

II. THE COURT SHOULD GRANT WRIT TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL.

In its short existence, the "arbitrary and capricious" standard of review has already taken on several different permutations. In Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), cert. denied, 54 L.W. 3227 (1985), the Court, without holding that the arbitrary and capricious standard of review was appropriate, nevertheless held that the denial of severance pay by the defendant Del Monte Corp. was arbitrary and capricious. In reaching that conclusion, the Court stated: ". . . a court must consider continuing procedural violations in determining whether the decision to deny benefits in a particular case was arbitrary and capricious" and held Del Monte's failure to follow ERISA rules and regulations in administering its severance pay plan weighed heavily against Del Monte. Id. at 1354.

In this case, the defendant Burlington Industries administered its severance pay policy as if ERISA had never existed. The company failed to follow the reporting and disclosure procedures, 29 U.S.C. §§1021(a) and (b), 1022, 1023(a)(1)(A), 1024(a)(1), the claims procedure required by ERISA, 29 U.S.C. §1133, and violated ERISA's prohibition against discrimination against persons who institute claims for benefits by refusing to consider any of the plaintiffs for employment after they filed this action. 29 U.S.C. §1140.

The Fourth Circuit, in its opinion in this case, did not follow the 9th Circuit Court of Appeals' opinion in Blau v. Del Monte Corp., supra, in adopting a different standard of review when the defendant failed to administer the severance pay plan in accordance with the procedural requirements of ERISA. The Second Circuit Court of Appeals

in Gilbert v. Burlington Industries, Inc., supra, specifically adopted the standard of review set forth by the Ninth Circuit in Blau v. Del Monte Corp., supra. In Gilbert the Court held that "the question of whether Burlington's violations of ERISA's requirements sufficiently taint its denial of severance pay so as to warrant a finding that it was arbitrary and capricious" was not before the Court and should be decided by the District Court. Gilbert v. Burlington Industries, Inc., 765 F.2d at 329.

Because of the divergence between the opinions in Gilbert v. Burlington Industries, Inc. and the Fourth Circuit in this case, the Court is faced with the situation of having identical benefit claims decided using two different standards under a federal statute which is supposed to provide uniformity.

In a further divergence of opinions, the Ninth Circuit Court of Appeals in Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985), held that when an employer's denial of severance pay benefits to a class would avoid a substantial outlay, the "reviewing court should consider that fact in applying the arbitrary and capricious standard of review. Less deference should be given to the trustee's decision." 755 F.2d at 712. The "less deference" standard of review of Jung v. FMC Corp., supra, was not utilized in this case and has yet to be defined by any court.

Three different versions of the arbitrary and capricious standard of review now exist. First, there is the uniform standard adopted by the Fourth Circuit in this case. Second, there is the "less deference" standard of review of Jung v. FMC Corp., supra, when the employer's denial of benefits to a class

avoids a very substantial outlay. Third, there is the standard review adopted by the circuit courts in Blau v. Del Monte Corp., supra, and Gilbert v. Burlington Industries, Inc., supra, in which procedural violations by the employer are considered against the employer in giving the claims decision.

The Court should grant the petitioners' writ in order to resolve these conflicts between the circuit courts of appeals' interpretation of this important federal statute.

III. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO DETERMINE THE EXTENT OF COVERAGE BY ERISA OF EMPLOYER SEVERANCE PAY POLICIES.

The Commissioner of Labor of the State of North Carolina, Plaintiff Intervenor in this action, has given notice of appeal to this Court pursuant to 28 U.S.C. §1254(2). In its Jurisdictional Statement filed

with this Court, the Commissioner of Labor contends that the promise of the defendant Burlington Industries to pay severance pay in this case does not constitute an "employee welfare benefit plan" under ERISA, 29 U.S.C. §1002(1) and, therefore, the severance pay policy of Burlington Industries is not covered by ERISA. Thus, the lower court mistakenly ruled that the North Carolina Wage and Hour Act, N.C.G.S. §95-25.1 et seq. and the North Carolina common law was preempted by ERISA and applied federal law instead of State law to this case. The plaintiffs refer the Court to the jurisdictional statement of the North Carolina Commissioner of Labor for the arguments in support of this position.

The consequences of the Fourth Circuit's holding that ERISA preempts the state wage and hour acts are devastating to millions of employees who will lose the assistance

of state agencies in enforcing their claims for severance pay and other employee benefits. In those cases, such assistance is critical since the amount of money involved in a severance pay claim is too small to justify of an employee pursuing the claim on his own. ERISA does not provide for such assistance nor are the resources available comparable to those provided by state agencies.

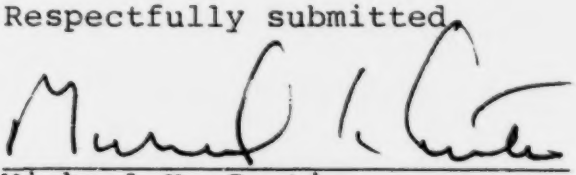
In addition to the loss of state assistance, the employee who is forced to present his claim under ERISA must face the "arbitrary and capricious" standard of review which defers claims decisions to the discretion of the employer. Under common law and the state wage collection statute, an employee is simply required to show that the employer is contractually obligated to pay the claim and deference is given to neither party's interpretation of the

severance pay policy.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-2241(L)

Rose M. Holland; Jean H. Stallings; Walter Burlington, Jr.; John C. Brooks, Commissioner of Labor of the State of North Carolina,

Plaintiffs,

and

Bill N. Slack; Jimmy W. Aheron; Carol Aldridge; Pamila B. Apple; Carole Baggett; Thomas F. Bowden; Walter Brom; Nellie B. Burwell; Elizabeth S. Canada; Gary L. Carter; Irene Chandler; James J. Clifford; Linda S. Coble; James A. Crawford; Ruth Dixon; Octavia M. Driver; Edmund Foster; Richard C. Foy; Peggy A. Gerringer; Deville Goodman; Ada R. Griffin; Delanor M. Hamby; Mildred R. Hester; Evelyn H. Hilton; Peggy W. Hodge; Mary E. Hope; Joseph J. Houston; Don Huffman; Jeff Hughes; Yvonnie B. James; Melvin E. King; Norma M. Loy; Sara Copeland Maness; Linda Mooneyham; Cora N. Moore; Virginia M. Moore; Robert C. Moricle; Edna M. Murray; Faye F. Neese; Gladys J. Oakley; Patricia G. Page; Daniel E. Perry; Barbara P. Petty; P. Douglas Pierce; Betty Hornady Ray; Ruth S. Rich; Mary Darlene

Rierson; Fred Brewer Roberts; Ida B. Saul; William A. Seelman; Sylvia R. Shoe; Gladys H. Shore, Frances Simmons; Mary Foust Stansell; Peggy P. Stone; Sherman C. Summers; Frances B. Sykes; Barbara D. Thompson; Ronald F. Tyree; Hazel P. Walker; Mary Lou Whitfield; Rita P. Whitley; Sandra F. Wilson; Brownie A. Wright; Elsie B. Young; Bettie J. Boswell; Debbie M. Rascoe; Lemmer Sherdina Sellars; Jack T. Sullivan; Claude O. Anders; Eva Barr; Margaret Brindle; Hoyt Cheek, Sr.; Hubert Foltz; Clyde Jarrell; Robert Martin; Thelma Martin; Leslie Morehead; Gerald Moretz; Alice Nelson; Carolyn Rayfield; Daisy Rickey; Ethel Royal; Larry Wright; William K. Anders; Merilla L. Barrier; Diane L. Boehm; Henry M. Brown; Hilda K. Cox; Stephen E. Elmore, Jr.; Richard L. Hall; William Jones; Paul M. King; Robert E. May; William Robert Oman; Cecil A. Poff; John W. Quick; Clifton Smith; Mary Smith; J. Clay Stiles, III; Bobby S. Tew; Thurman A. Chriscoe; Roy F. Williamson; Betty Albright; Nadine Albright; Boyce J. Asbill; Doris S. Baughan; Larry C. Beane; Melodye Snow Beard; Susan Beasley; Robert N. Blevins; Karen L. Boling; Wanda Bowman; Linda B. Brady; Linda P. Bristow; David Brittain; Marcella Jo Brittain; Mary R. Bullard; Betty S. Byrd; Charles H. Byrd; George M. Byrum; Charles F. Cagle, Jr.; Claude R. Cagle; Ann J. Campbell; Joe J. Cassett; Kimberly Spoon Coats;

Garland J. Cole; George C. Cole; Ted Cooley; Clara M. Cox; Phyllis Ingold Cox; Cindy M. Cranford; Tommy L. Cranford; Curtis L. Craven; Jackie Nall Davis; Wayne L. Duggins; Nancy M. Ellison; Herman A. Flynt; Cecil C. Gatlin; Earl Glover; Willard E. Gordon; Rayford B. Grant; James L. Hammer; Donald L. Harshaw; Larry Lee Highsmith; Tommy W. Hill; Kathryn Jeanette Hogan; Carroll D. Hoyle; Sandra Hunsucker; Katherine R. James; Linda Jordan Kennedy; Coy A. Kiser; Marilyn Hewitt Knight; Robert N. W. Knott; Gaynell H. Ledwall; Marguerite M. Lineberry; Shelby L. Logsdon; Marlene B. Lucas; Barbara S. Miller; Juanita K. Moody; Grace H. McNeill; Robert F. McWilliams; Susan B. Pack; Cathy D. Powers; Betty M. Reeves; Van E. Rich; Edwin L. Ridge; Harry Rose; Carol L. Savchak; Lenora C. Shaw; James W. Slaughter; Bobby N. Smith; Mike S. Smith; Imogene N. Snider; John W. Snider; Mary Edith Spoon; Jean A. Stafford; Mozelle A. Stout; Harriett W. Summey; Brenda S. Thomas; Gerald D. Thomas; Frances Freeman Tilley; Hazel S. Trogdon; Betty C. Von Cannon; Myrle L. Walker; William Bullock; Eurika Plummer; Terriel E. Wessinger, Jr.; Walter G. Williamson; James L. Wilson, Jr.; Mildred C. York; Faye T. Yow; Brian Dale Manuel; Raymond Claude Evans; A. Gene Heidel; Brenda B. Herndon; Russell W. Herndon; Virginia H. Schulte; Sandra G. Walker; Sharon G. Warren; Shirley

W. Welch and Roger Downs,

Appellants

versus

Burlington Industries, Inc.;
Calvin A. Michaels; Charles
A. McLendon; Humberto L.
Quintana;

Appellees.

State of New York,

Amicus Curiae.

No. 84-2257

Bill N. Slack; Jimmy W. Aheron; Carol Aldridge; Pamela B. Apple; Carole Gaggett; Thomas F. Bowden; Walter Brom; Nellie B. Burwell; Elizabeth S. Canada; Gary L. Carter; Irene Chandler; James J. Clifford; Linda S. Coble; James A. Crawford; Ruth Dixon; Octavia M. Driver; Edmund Foster; Richard C. Foy; Peggy A. Gerringer; Deville Goodman; Ada R. Griffin; Delanor M. Hamby; Mildred R. Hester; Evelyn H. Hilton; Peggy W. Hodge; Rose M. Holland; Mary E. Hope; Joseph J. Houston; Don Huffman; Jeff Hughes; Yvonnie B. James; Melvin E. King; Norma M. Loy; Sara Copeland Maness; Linda Mooneyham; Cora N. Moore; Virginia M. Moore; Robert C. Moricle; Edna M. Murray; Faye F. Neese; Gladys J. Oakley; Patricia G. Page; Daniel E. Perry; Barbara E. Petty; P. Douglas Pierce; Betty Hornady Ray; Ruth S. Rich; Mary Darlene Rierson; Fred Brewer Roberts; Ida B. Saul; William A. Seelman; Sylvia R. Shoe; Gladys H. Shore; Frances Simmons; Jean H. Stallings; Mary Foust Stansell; Peggy P. Stone; Sherman C. Summers; Frances B. Sykes; Barbara D. Thompson; Ronald F. Tyree; Hazel P. Walker; Mary Lou Whitfield; Rita P. Whitley; Sandra F. Wilson; Brownie A. Wright; Elsie B. Young; Bettie J. Boswell; Debbie M. Rascoe;

Lemmer Sherdina Sellars; Jack T. Sullivan; Claude O. Anders; Eva Barr; Margaret Brindle; Walter Burlington, Jr.; Hoyt Cheek, Sr.; Hubert Foltz; Clyde Jarrell; Robert Martin; Thelma Martin; Leslie Morehead; Gerald Moretz; Alice Nelson; Carolyn Rayfield; Daisy Rickey; Ethel Royal; Larry Wright; William K. Anders; Merilla L. Barrier; Diane L. Boehm; Henry M. Brown; Hilda K. Cox; Stephen E. Elmore, Jr.; Richard L. Hall; William Jones; Paul M. King; Robert E. May; William Robert Oman; Cecil A. Poff; John W. Quick; Clifton Smith; Mary Smith; J. Clay Stiles, III; Bobby S. Tew; Thurman A. Chriscoe; Roy E. Williamson; Betty Albright; Nadine Albright; Boyce J. Asbill; Doris S. Baughan; Larry C. Beane; Melodye Snow Beard; Susan Beasley; Robert N. Blevins; Karen L. Boling; Wanda Bowman; Linda B. Brady; Linda P. Bristow; David Brittain; Marcella Jo Brittain; Mary R. Bullard; Betty S. Byrd; Charles H. Byrd; George M. Byrum; Charles F. Cagle, Jr.; Claude R. Cagle; Ann J. Campbell; Joe J. Cassett; Kimberly Spoon Coats; Garland J. Cole; George C. Cole; Ted Cooley; Clara M. Cox; Phyllis Ingold Cox; Cindy M. Cranford; Tommy L. Cranford; Curtis L. Craven; Jackie Nall Davis; Wayne L. Duggins; Nancy M. Ellison; Herman A. Flynt; Cecil C. Gatlin; Earl Glover; Willard E. Gordon; Rayford B. Grant; James L. Hammer;

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Plaintiffs

and

John C. Brooks, Commissioner of Labor of the State of North

Carolina,

Appellant,

versus

Burlington Industries,
Inc.; Calvin A. Michaels;
Charles A. McLendon;
Huberto L. Quintana,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge. (C/A 83-274-G).

Argued: May 7, 1985 Decided:
SEPTEMBER 3, 1985

Before HALL and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Marion G. Follin, III; Tiare B. Smiley, Assistant Attorney General (Michael K. Curtis; Smith, Patterson, Follin, Curtis, James & Harkavy; Lacy H. Thornburg, Attorney General; John C. Brooks, Commissioner of Labor; Thomas A. Harris, Director Wage and Hour Division on brief) for Appellants/Intervenor; McNeill Smith

(Ben F. Tennille; Smith, Moore, Smith, Schell & Hunter on brief) for Appellee; (Robert Hermann, Solicitor General; O. Peter Sherwood, Deputy Solicitor General; Carlin Meyer, Assistant Attorney General; Jane Lauer Barker, Assistant Attorney General; Andrew Schultz, Assistant Attorney General; Robert Abrams, Attorney General on brief) for Amicus Curiae.

WILKINSON, Circuit Judge:

Former employees of Burlington Industries, Inc. Socks and Hosiery Divisions brought suit seeking to recover severance pay allegedly due upon Burlington's sale of the divisions to Kayser-Roth Corporation. The court below granted summary judgment for defendant after finding that the severance pay policy at issue was subject to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq., that ERISA pre-empted state law, and that Burlington's decision to deny severance pay was neither arbitrary or capricious. Finding no error in these holdings, we affirm.

I

The 200 appellants were employees of Burlington's Socks and Hosiery Divisions on January 3, 1982, when Burlington sold the divisions to Kayser-Roth as going concerns.

Pursuant to agreement with Burlington, Kayser-Roth offered employment to virtually all employees of these divisions, including appellants, who continued to work without interruption. The five employees not offered employment with Kayser-Roth received severance pay under the plan described below, and Burlington agreed to provide severance pay to any employee terminated by Kayser-Roth within six months of the transfer of ownership.

Burlington has maintained a severance pay plan for salaried employees since at least 1953. At the relevant time, the terms of the plan appeared in the company's Policy Manual, available to employees on request, and in the Salaried Employees' Handbook. The Handbook described the plan in general terms, providing that two weeks' to twelve months' severance pay would be available to "full time employees who

involuntarily leave the company."[1] The Policy Manual discussed the plan in more detail. In addition to setting out payment schedules for severance pay based on an employee's age and length of service, the Manual established eligibility requirements for severance pay. The most relevant requirement was that of "job termination," said to include "terminations due to circumstances such as elimination or modification of operations or other job elimination due

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[1] The complete text of the Handbook provision stated:

> SEVERANCE PAY.
>
> The Company provides severance pay to full-time employees who involuntarily leave the Company. Pay ranges from two weeks to twelve months, based on the employee's age and length of continuous service with the Company. Fraud or other behavior deemed to be willful could disqualify an employee from receiving severance benefits.

to bona fide organizational changes."[2]

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[2] Revelant portions of the Manual provided:

I. Company Policy

A. General - The Company makes payroll severance payments and vacation severance payments to eligible salaried employees who are terminated from the Company.

B. Payments - Payroll severance payments are based upon tables contained in this policy. . . .

II. Application of Policy

A. Payroll Severance - All regular full-time salaried employees who meet eligibility requirements are paid payroll severance.

1. Eligibility - Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company. Eligibility requirements are:

a. Job Elimination - This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes.

Appellants sought severance pay under this plan when Burlington sold the divisions to Kayser-Roth, asserting that they were entitled to the pay because their jobs with Burlington were terminated, and that their immediate re-employment by Kayser-Roth was irrelevant under the plan. Burlington denied that it owed severance pay, contending that there had been no "job elimination" as required by the Policy Manual.

Appellants initially sought redress in North Carolina state court, relying on common law claims of breach of contract and estoppel and several state statutes, including the North Carolina Wage and Hour Act, N.C. Gen. Stat. §95-25.7. The action was removed to federal court on Burlington's petition that the claims arose under ERISA. The plaintiffs amended their complaint to assert further claims based on ERISA. The Commissioner of Labor of the

State of North Carolina ("Commissioner") intervened.

On appeal, the Commissioner primarily argues that the severance pay plan is not covered by ERISA, and that ERISA does not preempt state law. On this score, he is joined by officials from ten states and the District of Columbia as amici curiae. The 200 individual appellants contend that the denial of severance pay violated ERISA.[3]

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[3] An action arising out of these same facts was filed in the Southern District of New York. The Second Circuit recently affirmed the district court's findings that the plan was within ERISA and that state law was preempted. Gilbert v. Burlington Industries, Inc., 765 F.2d 320 (2d Cir. 1985). The case was remanded for consideration of whether the denial of severance pay was arbitrary and capricious.

II

The Commissioner, joined by amici, asserts that ERISA simply does not apply to Burlington's severance pay policy, and that such a plan is therefore governed solely by state law. We reject this contention, and hold that Burlington's severance pay plan falls within the provisions of ERISA as an "employee welfare benefit plan." Moreover, ERISA governs employer severance pay plans whether funded from general assets, as here, or from a special trust.

Congress enacted this complex legislation to federalize much of employee pension and benefit law. It characterized plans covered by ERISA as either "employee pension benefit plans," 29 U.S.C. §1002(2) or "employee welfare benefit plans," 29 U.S.C. §1002(1), both of which must comply with ERISA's reporting and disclosure requirements, 29 U.S.C. §§1021-1031, and

its fiduciary standards for management of plan assets, 29 U.S.C. §§1101-1114. The former are subject to more stringent requirements than the latter, including the statute's vesting and funding requirements, 29 U.S.C. §§1053, 1082. None of the parties contends that the severance pay provision qualifies as an employee pension benefit plan. Rather, the issue is whether it constitutes an employee welfare benefit plan or a mere "payroll practice" -- as defined by Department of Labor regulations, 29 C.F.R. §2510.3-1 -- that falls outside the scope of ERISA.

The statutory language supports the designation of severance pay as an employee welfare benefit plan. Such plans, as defined in §3(1) of ERISA, 29 U.S.C. §1002 (1), includes:

> [A]ny plan, fund or program . . . maintained by an employer . . . for the purpose of providing for its participants or

> their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . unemployment . . . or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Subsection (A) above refers to "benefits in the event of . . . unemployment." The evidence in this case suggests that at least one purpose of the Burlington plan is to provide help for employees during periods of unemployment that follow the elimination of their jobs. This view of severance pay brings it within the definition of employee welfare benefit plan in §1002(1)(A) and thus within the ambit of ERISA. See Gilbert, 765 F.2d at 325; Jung v. FMC Corp., 755 F.2d 708, 710 n. 2 (9th Cir. 1985); Petrella v. NL Industries, Inc., 529 F.Supp. 1357, 1361 (D. N.J. 1982)("Severance pay, which in general is intended to tide an employee over while seeking a new job, certainly could be

considered an 'unemployment' benefit.")

Severance pay plans are also within the definition of 29 U.S.C. §1002(1)(B), which refers to 29 U.S.C. §186(c) for illustration of the types of benefits characterized as employee welfare benefit plans. Section 186(c)(6) describes "pooled vacation, holiday, severance or similar benefits" (emphasis added), and thereby brings such benefits within the meaning of employee welfare benefit plans. Other courts considering the issue have reached the same conclusion. See e.g., Gilbert, 765 F.2d at 325-26; Scott v. Gulf Oil Corp., 754 F.2d 1499, 1502 (9th Cir. 1985); Petrella v. NL Industries, Inc., 529 F.Supp. 1357, 1361-62 (D. N.J. 1982); Dependahl v. Falstaff Brewing Corp., 491 F.Supp. 1188, 1196 (E.D. Mo. 1980), aff'd, 653 F.2d 1208 (8th Cir.); cert. denied, 454 U.S. 968, sub nom. Dependahl v. Kalmanovitz, 454 U.S. 1084

(1981); Pinto v. Zenith Radio Corp., 480 F.Supp. 361, 362-63 (N.D. Ill. 1979), aff'd, 618 F.2d 110 (7th Cir. 1980).

Department of Labor regulations promulgated under ERISA reinforce the conclusion that the effect of the reference to §186(c) "is to include within the definition of 'welfare plan' those plans which provide holiday and severance benefits and benefits which are similar." 29 C.F.R. §2510.3-1(a)(3) (emphasis added). The Commissioner's contention that the Secretary of Labor lacks authority to interpret the statute in this manner has been definitely answered by Congress through subsequent amendment to the statute. In 1980, Congress added the language found at 29 U.S.C. §1002(2)(B): "The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which - (1)

severance pay arrangements . . . shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans." This amendment, adopted after the Secretary of Labor had promulgated the regulations, effectively sanctioned these regulations by statute and provided that severance pay arrangements, whether treated as pension plans or welfare plans, would be subject to the Act.

We also reject the Commissioner's contention that Burlington's severance pay plan is not within ERISA because it is not specially funded. He argues that §186(c)(6) includes only funded plans because that section concerns money paid to a "trust fund" established for the purpose of "pooled vacation, holiday, severance or similar benefits." 29 U.S.C. §186(c) (emphasis added). The Department of Labor requlations interpreting the reference to §186(c),

however, contain no limitation on the form of severance pay plans; the reference is to types of benefits that are to be covered by ERISA, whether in the form of trust funds or not. Scott, 754 F.2d at 1502. This is a reasonable interpretation of the statute, and one in which Congress has concurred by its 1980 amendments. The Second Circuit has also concluded that the interpretation reflected in the regulation is supported by the legislative history of the original enactment of ERISA. See Gilbert, 765 F.2d at 326.

The Commissioner further argues that the severance pay plan in this case is a "payroll practice" and not an employee welfare benefit plan according to the Department of Labor's own regulations. 29 C.F.R. §2510.3-1(b) defines payroll practice to include payments out of an employer's general assets of compensation on account of

work performed (including overtime pay, shift premiums, holiday premiums, and week-end premiums), id. §2510.3-1(b)(1), or for periods of absence due to medical or psychiatric reasons, id. §2510.3-1(b)(2), vacation, holiday, military duty, jury duty, training, or sabbatical leave, id. §2510.3-1(b)(3). Here the Commissioner's argument is refuted by omission. The regulations simply do not include severance pay as a payroll practice and, in light of the authority described above, we see no reason to disturb the Secretary's categorization of severance pay as an employee welfare benefit plan. Payroll practices refer to general asset compensation during employment; severance pay, by contrast, occurs after termination of employment. Scott, 754 F.2d at 1503. The Scott court reasoned soundly that the greater "danger of default" on large and unanticipated severance obligations argued also for

coverage under ERISA.

Though a major purpose of ERISA was to aid employees' knowledge and receipt of benefits, employees may, as here, urge that a particular policy is not within ERISA so that claims may be heard before state courts or questions of federal preemption of state statutes may be avoided. These desires, however, understandable, do not give us license to avoid the scheme established by Congress. As detailed above, Congress determined as a matter of policy that severance pay benefits should be subject to ERISA. It mandated that severance pay plans be subject to the reporting and disclosure requirements of ERISA, 29 U.S.C. §§1021-1031, so that employees would be aware of their benefits and better able to pursue them. The fact that employees may sometimes wish to forego these advantages of ERISA coverage in favor

of arguably more generous state statute does not allow us to escape the clear direction of Congress.

III

The district court concluded that ERISA's regulation of severance pay pre-empted state regulation of the matter. The Commissioner urges us to reverse this holding, arguing instead that ERISA and state statutes such as the North Carolina Wage and Hour Act should coexist and independently monitor severance pay plans. We do not agree and hold that ERISA pre-empts the state law claims asserted in this case.

When considering preemption of state law, "our task is to ascertain Congress' intent in enacting the federal statute at issue." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983). In ERISA, Congress

made its intent known in what has been called "the most sweeping federal pre-emption statute ever enacted by Congress." California Hospital Association v. Henning, 569 F.Supp. 1544, 1546 (C.D. Cal. 1983). 29 U.S.C. §1144(a) preempts, with certain exceptions not relevant here,[4] "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.

In Shaw, 463 U.S. at 96-97, the Supreme Court held that this language must be given broad effect: "A law 'relates to'

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[4] The exceptions allow continued operation of state insurance, banking, and securities laws, 29 U.S.C. §1144(b)(2)(A), within limits defined by the statue, 29 U.S.C. §1144(b)(2)(B), (b)(6), and generally applicable criminal laws, 29 U.S.C. §1144(b)(4). The Commissioner does not assert any of these exceptions to ERISA's pre-emption.

an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." The Court had previously noted that "[t]he only relevant state laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope." Alessi v. Raybestos-Manhatten, Inc., 451 U.S. 504, 523 n. 20 (1981). "The pre-emption provision was intended to displace all state laws that are consistent with ERISA's substantive requirements. Metropolitan Life Insurance Co. v. Massachusetts, ____ U.S. ____, 105 S.Ct. 2380, 2389 (1985).

A broad reading of the phrase "relates to" is consistent with the legislative history and policies behind ERISA. Congress rejected a narrower preemption provision, that would have preempted only state laws dealing directly with ERISA plans. See

Shaw, 463 U.S. at 98-100. Instead, "Congress legislated an ouster of all state laws relating to employee benefit plans." Depehdahl, 653 F.2d at 1215. This broad preemption furthers a major policy objective of ERISA -- uniformity in employee benefit laws. Congress realized that various state regulations of employee benefit plans had become a major concern to employers with plants, divisions, or employees scattered in numerous states, and a broad preemption provision was an integral part of ERISA's response to that concern. See Shaw, 463 U.S. at 99.

Given the unparalleled breadth of ERISA's preemption provision, we have no trouble concluding that the state actions at issue are preempted. The state law here essentially requires employers to pay wages due upon termination of employment, N.C. Gen. Stat. §95-25.7. Insofar as this

statute is invoked in pursuit of benefits allegedly due under Burlington's severance pay plan, it "relates to" an employee benefit plan covered by ERISA. Preemption applies to a state cause of action under common law as well, for the state breach of contract and estoppel claims pose the same potential as the statutory cause of action for conflicting employer obligations and variable standards of recovery.[5] As in

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[5] "ERISA does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans. Instead, Congress intended for the courts, borrowing state law where appropriate, and guided by the policies expressed in ERISA and other federal labor laws, to fashion a body of federal common law to govern ERISA suits." Scott, 754 F.2d at 1501-02 (citing cases).

Any hope of uniformity in employer obligations would be lost were we to allow various states' common law governing these obligations to coexist with federal common law under ERISA. Under such a scheme, employers would not only be faced with dual requirements within a single state, but with different state requirements wherever they do business. ERISA surely contemplates a different result.

Gilbert, "the state law claims . . . would determine whether any benefits are paid, and directly affect the administration of benefits under the plan." 765 F.2d at 327. ERISA and the policies underlying it require preemption.

The Commissioner attempts to escape this conclusion by invoking ERISA's definition of "state." ERISA, 29 U.S.C. §1144(c)(2), defines state to include "a state [and] any political subdivisions thereof . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." The Commissioner asserts that North Carolina does not, in fact, regulate the "terms and conditions" of the plan, and therefore its statute is not "state" law for preemption purposes. Given the explicitly broad nature of ERISA preemption, we are not inclined to limit ERISA's coverage through a restrictive

reading of this term. Even under a narrow interpretation, however, laws that, if given effect, would govern the very availability of benefits for particular individuals clearly regulate the "terms and conditions" of the plan. See Authier v. Ginsberg, 757 F.2d 796, 799, n. 4 (6th Cir. 1985).[6]

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[6] We reject the Commissioner's argument for a Tenth Amendment exemption from ERISA's preemption, see Garcia v. San Antonio Metropolitan Transit Authority, ___ U.S. ___, 105 S.Ct. 1005 (1985), or an exception based on the state's police power effectively rejected in Gilbert, 765 F.2d at 327.

We further reject the appellant's reliance on Livernois v. Warner Lambert Co., Inc., 723 F.2d 1148 (4th Cir. 1983). There the court resolved severance pay issues on state law grounds and noted that cases arising under ERISA were not pertinent and presented a different question. 723 F.2d at 1152-3, n. 6.

IV

Having concluded that ERISA governs the issues presented in this case, we must now determine whether Burlington properly denied the claims for severance pay presented by the individual appellants. In reviewing determinations of claim eligibility under ERISA, we employ an "arbitrary and capricious" standard. Berry v. Ciba-Geigy Corp., 761 F.2d 1003 (4th Cir. 1985); LeFebre v. Westinghouse Electric Corp., 747 F.2d 197 (4th Cir. 1984). See also, Wolf v. National Shopmen Pension Fund, 728 F.2d 182, 187 (3d Cir. 1984); Moore v. Reynolds Metals Company Retirement Program for Salaried Employees, 740 F.2d 454, 457 (6th Cir. 1984); Berg v. Board of Trustees, Local 705 International Brotherhood of Teamsters Health and Welfare Fund, 725 F.2d 68, 70 (7th Cir. 1984); Short v. Central States, Southeast and Southwest Areas

Pension Fund, 729 F.2d 567, 571 (8th Cir. 1984). We hold that the denial of severance benefits to the appellants was not arbitrary and capricious in this case.

A.

We see no reason to deviate from this circuit's "arbitrary and capricious" standard of review, despite the appellants' request that we do so. Appellants argue that the arbitrary and capricious standard should apply only where a formal trust fund is involved. Though many cases applying this standard to eligibility disputes do involve trusts, there is no reason to apply a different standard here. Where claim eligibility is involved, it is necessary to ensure that primary responsibility rests with administrators "whose experience is daily and continual, not with judges whose exposure is episodic and

occasional," Berry, 761 F.2d at 1006. This objective holds true whever consistent administration of a pension plan or welfare benefit plan covered by ERISA is at issue. Claim eligibility disputes, absent a finding that they have been resolved in an arbitrary and capricious manner, must remain with those who formulate and administer company plans and policies, whether formally trustees or not. Accord, Jung, 755 F.2d at 710-12; Sly v. P. R. Mallory & Co., Inc., 712 F.2d 1209, 1211 (7th Cir. 1983). To vary the standard of judicial review for general asset welfare plans would only sow confusion in ERISA, which we decline to do.

Appellants next urge that we apply here the more stringent fiduciary standards normally reserved for review of trustee's management of trust assets. See Struble v. v. New Jersey Employee Welfare Trust Fund, 723 F.2d 325 (3d Cir. 1984). In Struble,

plaintiffs challenged the trustee's decision to reduce employer payments into an overfunded plan rather than to increase the level of benefits. The court applied strict fiduciary standards because "the gravaman of the . . . complaint is not that the trustees have incorrectly balanced valid interests, but rather that they have sacrificed valid interests to advance the interests of non-beneficiaries." Id. at 333-34. In Struble, those affected by the trustees' action included all potential beneficiaries of the plan. Here, by contrast, one group among the many potential beneficiaries of a company plan dispute the denial of their claims, and the issue is not, as in Struble, whether the trustees "have sacrificed the interests of the beneficiaries as a class in favor of some third party's interests." Id. at 333 (emphasis added). Struble involved in

essence a fund management dispute, to which strict standards normally apply, rather than a question of claim eligibility, as here. See also, Jung, 755 F.2d at 711 (distinguishing Struble).

Finally, appellants argue that special circumstances may justify a less deferential application of the arbitrary and capricious standard than would normally obtain. In Blau v. Del Monte Corp., 748 F.2d 1348, 1353 (9th Cir. 1984), the court intimated that a more stringent review might be warranted "when ERISA's provisions have been flaunted in . . . a wholesale and flagrant manner." The evidence showed that the plan was "actively concealed" from employees, id. at 1352, and that the employer had failed to meet any of ERISA's procedural requirements. Accordingly, the court, though still applying the arbitrary and capricious standard, reviewed the

actions in light of the "continuing procedural violations." Id. at 1354.

We have underscored in this circuit the application of a single standard of review to questions of claim eligibility. See Berry, 761 F.2d 35, 37 (4th Cir. 1981). We see no reason to vary the standard based on procedural violations indicating bad faith, for such situations can be adequately resolved under the traditional standard. Where procedural violations evidence a "wholesale and flagrant" flouting of ERISA, the actions of administrators will not be insulated from a finding of arbitrariness. We would approach the question, however, within the framework of the single, uniform standard to be applied to all claim eligibility disputes.

B.

Applying this standard to the facts

before us, we find nothing arbitrary and capricious in Burlington's denial of severance pay. "Where the language used by the employer in holding out the plan is open to a construction supporting denial of a claim, the court should see whether the choice of that construction is arbitrary and capricious." Jung, 755 F.2d at 711. Here, Burlington determined that there was no "job elimination" as required by the plan because appellants had remained continuously employed in the same jobs they held before the transfer of ownership. This construction, though not compelled by the plan's language, is certainly a reasonable one, especially when viewed in light of the goals of the plan.

Burlington presented evidence that the plan was primarily intended for employees who suffered a period of unemployment when they were involuntarily terminated from

their jobs. Appellants argue that this purpose is refuted by the fact that the benefits did not end when a former employee found new work; this feature, they allege, shows that the plan was not a form of unemployment compensation but was instead a type of accumulated compensation for past services. This feature of the plan, however, could just as easily be attributed to the administrative convenience of avoiding the need to monitor former employees' status for up to twelve months. In any case, unemployment compensation was undoubtedly a major purpose of the plan. See Jung, 755 F.2d at 713; Sly, 712 F.2d at 1211.

Given this purpose, we find that Burlington's interpretation of the plan was reasonable. Though it is true that the appellants stopped working for Burlington and started working for Kayser-Roth, this

change in employer could reasonably be said to fall outside the scope of "job elimination." The appellants never missed a day of work due to the transfer, and most continued in their same jobs without interruption. There was no time during which they were forced to go without income due to the sale of the divisions. Employees who were not hired by Kayser-Roth received severance pay in due course. Under these circumstances, the denial of severance pay benefits to the appellants was not arbitrary and capricious but was in fact a perfectly reasonable interpretation of Burlington's severance pay policy which courts may not replace with an interpretation of their own. LeFebre, 747 F.2d at 204-05.

Moreover, the facts of this case do not suggest a "wholesale and flagrant" flouting of ERISA procedures that would indeed evidence bad faith and arbitrary behavior on an

employer's part. Whatever violations may have occurred do not approach the level of those in Blau. There, for example, the plan was actively concealed from the employees; here, a general statement of policy was given to every employee and a detailed description was available upon request. Moreover, the employer in Blau never informed employees of its decision to deny severance pay. By contrast, Burlington promptly informed appellants that severance pay was not available under its policy. In this context, we are unable to conclude that procedural violations indicate bad faith so as to render the decisions of Burlington arbitrary and capricious.

V

We affirm finally the decision of the court below not to award injunctive relief against Burlington. Appellants alleged

that Burlington discriminated against them for pursuit of legal remedies by refusing to consider them for reemployment. ERISA, 29 U.S.C. §1140, prohibits such behavior, and appellants sought injunctive relief against the practice. Though there is evidence that Burlington refused to consider appellants for reemployment for several months, no one was affected by this policy while it was in force. Moreover, a corporate directive was subsequently issued to forbid such behavior, and three plaintiffs were in fact reemployed by Burlington. Given these facts, we find that the court below did not abuse its discretion in denying appellants' request for injunctive relief.

VI

We have considered the contentions of appellants and find that they were properly

resolved by the district court. The judgment of that court is, accordingly,

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

BILL N. SLACK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C-83-274-G
	)	
BURLINGTON INDUSTRIES, INC., et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

ERWIN, District Judge

This cause came on for hearing on August 27, 1984 at the United States Courthouse in Greensboro upon motions filed by all parties in the case. Plaintiffs are 202 former employees of defendant Burlington Industries, Inc., (Burlington) Sock and Hosiery Divisions. The case centers on whether plaintiffs are entitled to benefits under a severance pay policy in effect at the time defendant Burlington sold its Sock

and Hosiery Divisions to Kayser-Roth Corporation in 1982 as ongoing concerns. After defendant Burlington refused to pay any benefits under the severance policy to its former employees who now work for Kayser-Roth, plaintiffs filed an action in state court alleging five grounds for relief. All five grounds are based on state statutory and common law. The first ground alleges common law breach of contract. The second ground alleges violation of N.C. Gen Stat. §95-25.7, which requires employers to pay employees all wages due at the time of termination of employment. The third ground is based on the theory of equitable estoppel. The fourth ground is based on the contract theory of reliance. The fifth ground alleges violation of N.C. Gen Stat. §75-1.1, which prohibits unfair or deceptive trade practices.

Thereafter, defendant Burlington

petitioned for removal of the action to federal court, asserting that the severance pay policy is an employee benefit plan subject to the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §1001 et seq. Without prejudging in any fashion the merits of the intervenor complaint, this court allowed the North Carolina Commissioner of Labor to intervene in the federal action.

In federal court, plaintiffs filed a motion for preliminary injunction to enjoin defendant Burlington from refusing to consider any of the plaintiffs for re-employment with Burlington so long as they were plaintiffs in the present action. Plaintiffs were then granted leave to file an amended complaint which added three new defendants, all executives of defendant Burlington, and which alleged three additional grounds for relief. The three

grounds for relief alleges that plaintiffs are entitled to benefits under the severance pay policy pursuant to 29 U.S.C. §1132(a)(1)(B). The seventh ground alleges that defendant's refusal to consider any of the plaintiffs for re-employment constituted discrimination in violation of 29 U.S.C. §1140. The eighth ground alleges that the three new defendants breached their fiduciary duty with respect to the severance pay policy as defined in 29 U.S.C. §1104(a)(1).

Defendant Burlington then filed a motion for summary judgment pursuant to Rule 56, F.R.Civ.P., against plaintiffs and plaintiff-intervenor with supporting brief, affidavits, and depositions. Thereafter, plaintiffs filed a motion for partial summary judgment on the three claims based on ERISA pursuant to Rule 56, F.R.Civ.P., with supporting brief, affidavits, and

depositions. Additionally, plaintiff-intervenor filed a motion to dismiss for lack of federal jurisdiction, alleging that Burlington's severance pay policy is not governed by ERISA.

Plaintiff-Intervenor's Motion to Dismiss

In its motion to dismiss, plaintiff-intervenor contends that defendant Burlington's severance pay policy is not governed by ERISA; therefore, there is no basis for federal jurisdiction. Furthermore, plaintiff-intervenor asserts that defendant Burlington failed to allege any alternate grounds for federal jurisdiction and moves for a remand of this action to the state courts. The issue before the court is whether defendant Burlington's severance pay policy is governed by ERISA. The thrust of plaintiff-intervenor's argument is that defendant's severance pay policy is a payroll practice policy subject to the North Carolina Wage and Hour Act

rather than an employee welfare benefit plan subject to ERISA. In support of its argument, plaintiff-intervenor contends that:

1. Defendant's severance pay policy does not satisfy the required statutory scheme because it is funded from Burlington's general assets and does not have a separate entity from defendant;

2. The Department of Labor has exceeded its authority where it appears to expand the definition of employee welfare benefit plans to include all severance pay arrangements, even where they are not set as jointly administered trust funds; and

3. Defendant has failed to comply with ERISA's formal requirements regarding an employee benefit plan and should be estopped from using ERISA as a shield to avoid liability under the North Carolina

Wage and Hour Act.

All of these contentions are without merit. First, both the statute and case law include severance pay arrangements within the definition of employee welfare benefit plans for purposes of ERISA coverage. Title 29 of the United States Code, Section 1002(2)(B), states: "The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which . . . severance pay arrangements . . . shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans." The Secretary has promulgated such a rule which treats a severance pay plan as an employee welfare benefit plan. 29 C.F.R. §2510.3-1 (a)(3)(1983). Additionally, the courts have consistently held that severance pay plans were employee welfare benefit plans

under ERISA. See Sly v. P. R. Mallory & Co., Inc., 712 F.2d 1209 (7th Cir. 1983); Dhayer v. Weirton Steel Division of National Steel Corp., 571 F.Supp. 316 (N.D. W.Va. 1983); Donnelly v. Aetna Life Ins. Co., 465 F.Supp. 696, 698 (E.D.Pa. 1979); Calhoun v. Falstaff Brewing Corp., 478 F. Supp. 357, 359 (E.D.Mo. 1979); Petrella v. NL Industries, Inc., 529 F.Supp. 1357 (D.N. J. 1982); Pinto v. Zenith Radio Corp., 480 F.Supp. 361, 362-63 (N.D.Ill. 1979), aff'd, 618 F.2d 110 (7th Cir. 1980); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir.), cert. denied sub nom. Dependahl v. Kalmanovitz, 454 U.S. 1084 (1981).

Secondly, there is no case law to support the proposition that severance pay arrangements must be funded from trust assets separate from the employer's general assets or that the arrangement must exist as a separate entity. As the court in

Dhayer v. Weirton Steel Division of National Steel Corp., supra, at 330, noted: "Indeed, the funding requirements of ERISA do not apply to employee welfare benefits plans such as a severance pay benefit, 29 U.S.C. §1081, and there is no 'fund' or group of assets subject to the prohibited transaction provisions."

Lastly, plaintiff-intervenor's equitable estoppel argument does violence to the purpose of ERISA. The court in Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982), aptly observed:

> [B]ecause the policy of ERISA is to safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan . . . it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans, or assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary

standards.

Therefore, the court finds that defendant Burlington's severance pay policy is governed by ERISA, and the court has jurisdiction of this case. Accordingly, plaintiff-intervenor's motion to dismiss must be denied.

Defendant Burlington's Motion for Summary Judgment

In its motion for summary judgment, defendant Burlington contends that plaintiffs and plaintiff-intervenor's claims based upon state laws are preempted by federal law and that defendant should prevail as a matter of law on the remaining claims based on ERISA. The court will first address the effect of preemption on the state law claims asserted by plaintiffs and plaintiff-intervenor.

Federal Preemption of State Law Claims Under ERISA

The Employment Retirement Income

Security Act of 1974 regulates employee fringe benefit plans. ERISA provides for preemption of state law in 29 U.S.C. §1144(a) as follows:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Although specific kinds of state laws are exempt from preemption under this statute, see 29 U.S.C. §1144(b)(2)(A), the effect of the preemption provision is quite broad. Relying on the legislative history of the statute as well as the statute's plain language, the Supreme Court in Shaw v. Delta Air Lines, Inc., ____ U.S. ____, 51 U.S.L.W. 4968 (June 24, 1983), held that 29 U.S.C.

§1144(a) could not be interpreted to pre-empt only state laws dealing with specific subject matters covered by ERISA but pre-empted state laws that "relate to any employee benefit plan" within the meaning of the statute. Thus, it is clear that state laws (including all laws, decisions, rules, regulations, or other state action having the effect of law) are preempted by ERISA if they "relate to" employee benefit plans not exempted by the statute.

In his complaint, plaintiff-intervenor alleges that the defendant Burlington is liable to the individual plaintiffs for severance pay pursuant to the North Carolina Wage and Hour Act, N.C. Gen. Stat. §95-25.1 et seq. Wages are defined by the Act as specifically including severance pay. N.C. Gen. Stat. §95-25.2(16). The Act also allows either employees or the Commissioner of Labor to bring a civil action to recover

unpaid wages and provides for exemplary damages and injunctive relief.

The court has held that Burlington's severance pay plan is an employee benefit plan subject to ERISA. Inasmuch as the North Carolina Wage and Hour Act defines severance pay as wages, the state statute "relates to" the severance pay plan of Burlington. Accordingly, plaintiff-intervenor's claims under the Act are pre-empted by ERISA. Therefore, the court must grant defendant's motion for summary judgment as to the claims asserted by the plaintiff-intervenor.

Plaintiffs' second claim for relief is also brought pursuant to the North Carolina Wage and Hour Act. For the reasons stated above, the court must grant defendant's motion for summary judgment with respect to plaintiffs' second claim for relief.

In their first, third, and fourth

claims for relief, plaintiffs allege they are entitled to recover severance pay based on common law contract and estoppel theories. These common law claims "relate to" defendant Burlington's severance pay plan and are preempted by ERISA under 29 U.S.C. §1144(a). Therefore, the defendant Burlington's motion for summary judgment as to plaintiffs' first, third, and fourth claims must be granted.

Plaintiffs' fifth claim based on the North Carolina Unfair Competition Act, N.C. Gen.Stat. §75-1.1 must be dismissed because the provisions of the Act do not apply to employer-employee relationships. Buie v. Daniel Intern Corp., 56 N.C.App. 445, 289 S.E.2d 118 (1982). Therefore, defendant's motion for summary judgment with respect to plaintiffs' fifth claim must be granted.

Claims Based upon ERISA

A careful review of the record indicates

that there is no genuine issue of material fact and that defendants are entitled to judgment in their favor as a matter of law on the remaining claims based upon ERISA. The standard of review of a claims decision made by a plan administrator is whether the administrator's decision was arbitrary or capricious. Horn v. Mullins, 650 F.2d 35 (4th Cir. 1981). This standard of review is applied whether the "plan" is an employee pension plan or, as here, an employee welfare benefit plan providing for severance pay. Sly v. P. R. Mallory & Co., 712 F.2d 1209, 1211 (7th Cir. 1983). Thus, the court must determine whether there is substantial evidence to support defendants' decision to deny severance pay to plaintiffs.

Plaintiffs contend that the governing document in this case is the Salaried Employees Handbook. The handbook contains

highlights of Burlington's benefit plans. The handbook is distributed to all salaried employees of Burlington and contains a description of the defendant Burlington's severance pay plan. The court finds, however, that the governing document for the administration of the severance pay plan is the Company Policy Manual rather than the Salaried Employees Handbook. The Policy Manual contains a compilation of formal policy statements. Although the salaried employees were not provided with a copy of the policy manual, the employees did have access to it.

The Policy Manual contained a section dealing with severance pay as early as June 1953. The provisions of that section were revised on various occasions during the relevant period. A 1974 revision provided that "job elimination" was a condition of eligibility for severance pay. The

language in effect at the time of the sale of the Sock and Hosiery Divisions to Kayser-Roth provided in pertinent part:

> 1. Eligibility - Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company. Eligibility requirements are:
>
> a. Job Elimination - This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes.

Plaintiffs argue that "job elimination" applies to involuntary terminations of employees when their jobs are eliminated with defendant, irregardless of the availability of employment elsewhere. Defendants, on the other hand, argue that the words, "job elimination" refer to the elimination of jobs as such and that when

jobs are preserved as a result of an organizational change, the mere loss of employment at Burlington does not trigger eligibility for severance pay. The court finds that defendants' interpretation of its plan is rational in view of the plain language of the plan, the purpose of the plan, and defendants' past practices in relation to the severance pay plan.

Burlington established its severance policy for the purpose of providing financial support to employees whose jobs are lost through no willful fault of their own and who might therefore be in need of financial resources during a period of unemployment. It is evident that since the inception of Burlington's present severance policy in 1974, defendants have consistently applied that policy in the context of plant and division sales to bar severance pay to employees who continue in

their jobs under new management. The court notes that a payment to Fleet Services employees who were terminated by Burlington but who continued working with new employers was a special cash award rather than severance pay. The court finds that defendants' decision to deny plaintiffs severance pay benefits was supported by substantial evidence on the record and was not arbitrary or capricious.

In their seventh claim for relief, plaintiffs allege that defendants have discriminated against them by refusing to consider plaintiffs for re-employment with Burlington because they filed this lawsuit. Plaintiffs seek injunctive relief. Title 29 of the United States Code, Section 1140, prohibits discrimination against a participant for exercising any right to which he is entitled under ERISA or under the employee benefit plan or for the purpose

of interfering with the attainment of any right to which the participant may become entitled under the plan.

The court finds that plaintiffs' seventh claim is moot. Although the deposition of Burlington's director of personnel reveals that defendants adopted a policy after this action was filed of refusing to consider the plaintiffs for re-employment, this policy was subsequently revoked. Quintana's Affidavit. There is no evidence that at the present time, plaintiffs who seek re-employment with Burlington are being denied consideration. Therefore, the court finds that injunctive relief is inappropriate.

Plaintiffs' eighth and final claim for relief alleges that Burlington and three employees of Burlington who hold management responsibility for the personnel policies of Burlington breached fiduciary

duties owed to plaintiffs under ERISA. This claim is without merit. As the court noted previously, defendants' decision to deny plaintiffs severance pay is supported by substantial evidence on the record and was not arbitrary or capricious. Therefore, the court finds that defendants discharged their duties in administering the severance pay plan with diligence and prudence and in accordance with the documents governing the plan. 29 U.S.C. §1104(a)(1).

For the foregoing reasons, IT IS ORDERED, ADJUDGED, AND DECREED that defendants' motion for summary judgment is hereby GRANTED; that plaintiffs' motion for partial summary judgment is hereby DENIED; and that plaintiff-intervenor's motion to dismiss is hereby DENIED. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion for preliminary

injunction is hereby DENIED. A judgment will be entered contemporaneously with this Memorandum Opinion dismissing this action with prejudice as to the defendants.

/s/ Richard C. Erwin
United States District Judge

October 17, 1984

A True Copy

Teste:

J. P. Creekmore, Clerk

By:

/s/ Martha M. Robbins
Deputy Clerk

STATUTORY PROVISIONS INVOLVED

EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM

SUBCHAPTER I - PROTECTION OF EMPLOYEE BENEFIT RIGHTS

29 U.S.C. §1001. Congressional findings and declaration of policy

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. §1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an

employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or dispostion of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility

to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. §1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan -

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in section 1024(b)(3) and 1025(a) and (c) of this title.

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor

The administrator shall, in accordance with section 1024(a) of this title, file with the Secretary -

(1) the summary plan description described in section 1022(a)(1) of this title;

(2) a plan description containing the matter required in section 1022(b) of this title;

(3) modifications and changes referred to in section 1022(a)(2) of this title;

(4) the annual report containing the information required by section 1023 of this title; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

29 U.S.C. §1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing

the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133

of this title).

29 U.S.C. §1023. Annual reports

(a) Publication and filing

(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024 (a) of this title, and shall be made available and furnished to participants in accordance with section 1024(b) of this title.

29 U.S.C. §1024. Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary

(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary -

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 1022(a)(2) of this title within 60 days after such modification or change is adopted or occurs, as the case may be.

The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annual reports available for inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

29 U.S.C. §1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter III of this chapter.

29 U.S.C. §1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought -

(1) by a participant or beneficiary

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to

future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025 (c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions

under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. §1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall -

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any particant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. §1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.